

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOAN R. BUDIG

Claimant

VS.

DUNHILL STAFFING

Respondent

AND

ZURICH AMERICAN INSURANCE CO.

Insurance Carrier

Docket No. 1,017,588

ORDER

Respondent and its insurance carrier (respondent) requested review of the June 8, 2006, motion hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found that the motion hearing held on May 2, 2006, was a continuation of claimant's request for a change of physician which was the subject of a preliminary hearing held on December 15, 2005. Accordingly, the ALJ found that the matter was properly before the court. The ALJ also found that all the physicians provided by respondent have refused to provide the medical treatment ordered for claimant. Therefore, pursuant to K.S.A. 44-510h(b)(1), the ALJ named Dr. Pat Do as the authorized treating physician to provide pain medication or refer claimant to see an appropriate physician to monitor her pain medication.

Respondent asserts that the claimant failed to follow the procedural requirements necessary before a preliminary order granting benefits can be issued. Respondent argues that the issues raised in the motion hearing held on May 2, 2006, were not the same as the issues raised at the December 15, 2005, preliminary hearing. Respondent states that at the May 2 motion hearing, the ALJ authorized Dr. Do to prescribe pain medication rather than just monitor claimant's pain medication as had been ordered as a result of the December 15, 2005, preliminary hearing. Respondent also claims that, contrary to the ALJ's order, claimant did not request the director to select an authorized treating physician as provided by K.S.A. 44-510h(b)(1) but, instead, claimant requested the right to select her own physician. Respondent, therefore, asserts that the ALJ erred in finding that a

preliminary hearing was not necessary in order for claimant to address her issues and requests that the Order of the ALJ be reversed.

Claimant argues that her request for an order allowing her to request her own physician stems from and is a continuation of the preliminary hearing of December 15, 2005, and the court's order of January 19, 2006. Claimant also contends that K.S.A. 44-510h(b)(1) does not mandate compliance with K.S.A. 44-534a as it relates to the requirements of a preliminary hearing. Accordingly, claimant requests that the ALJ's Order be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the record presented to date, the Board makes the following findings of fact and conclusions of law:

Claimant was injured at work on May 14, 2004. Respondent authorized Dr. Paul Stein as her authorized treating physician. On May 12, 2005, Dr. Stein issued a report finding that claimant was at maximum medical improvement and stating: "An authorized physician should be named to monitor and provide analgesic medication."¹

On May 13, 2005, claimant mailed respondent its notice of intent requesting, among other benefits, that claimant be provided with a change of treating physician. On May 24, 2005, claimant filed an Application for Preliminary Hearing with an attached certification letter and a copy of the notice of intent. A preliminary hearing was scheduled for June 23, 2005. On that date, by agreement of the parties, the ALJ issued an order ordering respondent to provide claimant with a TENS unit and to provide a physician "to monitor and provide analgesic medication per Dr. Stein's May 12, 2005 note."²

By July 27, 2005, claimant had not received the name of the physician respondent had agreed to provide to monitor her medication and, on July 28, 2005, claimant filed a Motion to Allow Claimant to Choose a Treating Physician. When discussing with respondent's attorney the scheduling of this motion for a hearing, claimant's attorney was told that Dr. John McMaster was going to be authorized to monitor claimant's medications. A motion hearing was held on September 1, 2005. On September 12, 2005, the ALJ denied claimant's request to choose a treating physician.

On October 6, 2005, claimant mailed respondent another notice of intent, again requesting, among other benefits, that claimant be provided with a change of treating physician. On October 21, 2005, claimant filed another Application for Preliminary Hearing

¹ Motion Hearing Trans. (Sept. 1, 2005), Cl. Ex. 1 at 2.

² ALJ Order (June 23, 2005).

with an attached certification letter and a copy of the notice of intent. The preliminary hearing was held on December 15, 2005. At that hearing, claimant asked for an authorized physician to provide treatment for her continuing shoulder, low back, and hip problems. Respondent agreed to provide a list of three doctors to provide this treatment. The ALJ, however, in an order dated January 19, 2006, appointed Dr. Pat Do to conduct an independent medical examination of claimant and deferred her ruling on this issue until after receipt of Dr. Do's report.

Also at the December 15, 2006, preliminary hearing, claimant requested a change of physician relating to the monitoring of her analgesic medications, asking that the appointed physician be nearer to her home town. Claimant testified that she no longer wanted to be seen by Dr. McMaster, saying he was rude and that he wanted her to travel to Wichita three times a week for physical therapy. Respondent introduced into evidence a letter from Dr. Stein to respondent's attorney dated December 6, 2005, in which Dr. Stein stated:

I believe it would be most appropriate for her to be in the hands of someone such as Dr. McMaster for the purpose of weaning her from the narcotic medication and providing a reasonable non-narcotic program in the future. I see no reason why she cannot come to Wichita for this care on a monthly basis for a time, given the amount of travel you have indicated in your letter. In my opinion, the patient can be given the choice of participating in a physician directed program or dealing with her pain using nonprescription, over-the-counter medications.³

Respondent requested that claimant continue with the physician-monitored program provided by respondent with Dr. McMaster or, in the alternative, be treated with nonprescription, over-the-counter medications as per Dr. Stein's December 6, 2005, letter.

On January 19, 2006, the ALJ issued an Order stating: "Respondent shall submit a list of three physicians to claimant within five (5) days. The list shall consist of physicians closer to Great Bend, Kansas. The selected physician shall be authorized to monitor and provide analgesic medication for claimant."⁴ On January 27, 2006, respondent sent claimant a list of physicians containing the names of Dr. Milo Sloo, Dr. Daniel Schowengerdt, and Dr. Fred Smith. Claimant first requested to be seen by Dr. Sloo and then by Dr. Schowengerdt for the purpose of monitoring and providing her analgesic medication. Both Drs. Sloo and Schowengerdt refused to provide medical treatment to claimant without examining or talking to her. Claimant then requested the treatment from Dr. Smith. Dr. Smith saw claimant one time, on March 28, 2006. Dr. Smith concluded that claimant should not be treated with opioids, stating that she was not suffering enough pain to warrant those types of medications. He also stated that claimant "needs to be rapidly

³ P.H. Trans. (Dec. 15, 2005), Cl. Ex. 4.

⁴ ALJ Order (Jan. 19, 2006) at 2.

moved out of the work comp system and treatment taken over by a primary care physician and her psychiatrist.”⁵

On April 21, 2006, claimant filed a motion requesting an order

“allowing claimant to choose her own physician to monitor and provide her pain medication. Respondent provided claimant with a list of three physicians pursuant to the Court’s order of January 19, 2006. These doctors have all refused to provide the care authorized in the Court’s Order.”⁶

A motion hearing was held on May 2, 2006. Claimant testified that she did not need opioid medication as referred to by Dr. Smith but was requesting analgesic medication. Claimant stated that Dr. Smith did nothing but examine her and argued that respondent’s list of three physicians was a ruse. Claimant requested that her personal physician be allowed to monitor and provide her with the analgesic medication. Respondent argued that Dr. Smith saw claimant to monitor her analgesic medication and did not refuse to treat her. Respondent also argued that the motion hearing was a request for benefits and did not follow the procedural requirements for a preliminary hearing. Claimant responded that she did not need a notice of intent because the motion hearing was an extension of the ALJ’s preliminary hearing Order of January 19, 2006.

After hearing arguments by counsel and hearing testimony of claimant, the ALJ issued an order on June 8, 2006, authorizing Dr. Do to provide treatment to claimant for her shoulder, low back, and lower extremity complaints. That order was not appealed. The ALJ issued a second order dated June 8, 2006, in which she found that all of the physicians provided by respondent to monitor and provide analgesic medication for claimant had refused to provide the medical treatment ordered. The ALJ ordered that pursuant to K.S.A. 44-510h(b)(1), Dr. Do was “authorized to provide pain medication or he may make a referral for claimant to see an appropriate physician to monitor her pain medication.”⁷ Respondent appeals from that order.

The Board finds that the ALJ retained jurisdiction over the subject matter of the September 1, 2005, and December 15, 2005, hearings and, therefore, another notice of intent letter was not required.⁸ Respondent argues that the ALJ erred in finding that claimant’s motion hearing was a continuation of the previous preliminary hearing because claimant was not seeking the same benefit. Respondent alleges two differences. First,

⁵ Motion Hearing Trans. (May 2, 2006), Cl. Ex. 5 at 4.

⁶ Claimant’s Motion to Request Order (filed Apr. 21, 2006).

⁷ ALJ Order (June 8, 2006) at 3.

⁸ See *Reed v. Matt Sherman*, Docket No. 1,005,775, 2005 WL 3030741 (Kan. WCAB Oct. 18, 2005).

claimant had previously sought a physician to “monitor” her analgesic pain medication, but the ALJ’s June 8, 2006, Order authorized Dr. Do to “prescribe” pain medication. The Board does not consider this to be a significant distinction. If a physician is going to monitor pain medications prescribed by a previous treating physician who is no longer involved in claimant’s care, the new physician must be able to adjust those medications or change the prescriptions if indicated and even write new prescriptions for the same medications when refills for the original prescriptions expire or run out. Accordingly, respondent should not expect a physician or an ALJ to order a physician to “monitor” a patient’s medications without including in that authorization the right to change the prescriptions previously chosen by another physician.

Second, respondent contends that claimant was no longer requesting that the Director (ALJ) select a new physician but, instead, claimant was requesting the right to select her own physician. Again, this distinction is de minimus. The ALJ selected Dr. Do, who was authorized to treat claimant’s shoulder, back, and leg, “to provide pain medication or . . . make a referral for claimant to see an appropriate physician to monitor her pain medication.”⁹ The ALJ did not give claimant carte blanche to choose her own physician. The ALJ’s order renders respondent’s objection moot.

The May 2, 2006, hearing was a continuation of the prior change of physician hearing. Furthermore, even a cursory review of the procedural history of this claim shows that respondent clearly had ample notice, was fully aware of the issues, and cannot claim that any prejudice resulted from the absence of yet another notice of intent letter from the claimant.

The Workers Compensation Act gives the ALJ authority to address issues concerning medical treatment pre-award, and the Board’s jurisdiction to review such orders is limited.¹⁰ As this appeal is not from a final award and the ALJ did not exceed her jurisdiction in entering her order of June 8, 2006, the Board will not otherwise address the merits of the ALJ’s order.

WHEREFORE, it is the finding, decision and order of the Board that this appeal from the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 8, 2006, is dismissed.

IT IS SO ORDERED.

⁹ ALJ Order (June 8, 2006) at 3.

¹⁰ K.S.A. 534a(a)(2) and K.S.A. 2005 Supp. 44-551(b).

Dated this _____ day of September, 2006.

BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier